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No. 85-1713

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

RENN DRUM, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Mora v. *United States*, cert. denied, No. 85-5437 (Jan. 21, 1986) 5

United States v. *Bagnell*, 679 F.2d 826, cert. denied, 460 U.S. 1047 5

United States v. *Bailey*, 444 U.S. 394 4

United States v. *Busby*, 780 F.2d 804 4

United States v. *Cruz*, 783 F.2d 1470 4

United States v. *Hill*, 626 F.2d 1301 5

United States v. *Luce*, 726 F.2d 47 5

United States, 584 F.2d 1316, cert. denied, 439 U.S. 1130 4

United States v. *Sarmiento*, 786 F.2d 665 5

United States v. *Stanley*, 765 F.2d 1224 4

United States v. *Woosley*, 761 F.2d 445 4

Statute:

21 U.S.C. 846 1

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Petitioner contends that the district court erred in refusing to instruct the jury on the defense of entrapment.

Following a jury trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846. He was sentenced to three years' imprisonment and a $2,400 fine; the district court suspended all but 90 days of the prison term and placed petitioner on probation for five years.

1. The evidence at trial showed that petitioner, an attorney, was a member of a large drug conspiracy, serving as an intermediary between the conspiracy's organizers and its mid-level suppliers. Between August and October 1983, three suppliers in the conspiracy, Donald Jones, Susan Weeks, and John Foelker, were arrested in North Carolina

on charges of assaulting a federal officer. After their arrests, the three were transferred to Georgia, where the assault had occurred. Petitioner, who represented Henry Warden, the organizer of the conspiracy, also represented Foelker at his bond hearing. During this period, petitioner met several times with Jones and Weeks in their cells to arrange for future cocaine deliveries to Warden. Petitioner asked them about the effect of their arrests on the conspirators' ability to obtain cocaine and sought advice about a replacement for Jones during his incarceration. Later, petitioner advised them that he had provided false identification papers to Jones' possible replacement. Petitioner relayed Jones' and Weeks' messages to Warden. Pet. App. 4-5; C.A. App. 457, 460-462, 833, 989-992.

In November 1983, Weeks and Jones began cooperating with the government and they informed federal agents about petitioner's visits to them in jail. Later that month, they pleaded guilty to charges stemming from their roles in the conspiracy. As part of their agreement with the government, Weeks and Jones pretended to supply more cocaine to Warden in North Carolina. Weeks was released from jail on the pretext that she was trying to obtain a job in North Carolina. Between December 1983 and January 1984, Jones and Weeks telephoned petitioner several times and asked petitioner to contact Warden for them concerning future cocaine deliveries. Petitioner telephoned Warden on their behalf several times, although he cautioned Weeks that he was only a "facilitator," that he was not directly involved in drug transactions, and that he never touched money or drugs. On February 1, 1984, Weeks told petitioner that she had cocaine and wanted petitioner to contact Warden to arrange for a delivery. Petitioner complied and later went to Weeks' hotel room, although he refused to touch the drugs. Warden arrived shortly thereafter and took the purported cocaine. Pet. App. 5-6; Gov't C.A. 12-17.

Testifying in his own behalf, petitioner confirmed that he was Warden's attorney, but he denied any involvement in the drug conspiracy. He explained that he talked with Weeks following her release from jail to help her find a legitimate job in North Carolina. Petitioner said that he tried to discourage Weeks from obtaining drugs. Warden testified that he was petitioner's client and that petitioner was not a member of the drug conspiracy (Gov't C.A. Br. 18-22). During the charge conference the district court denied petitioner's request that the jury be instructed on entrapment (*id.* at 23).

2. The court of appeals affirmed (Pet. App. 1-23), holding that the district court had properly denied petitioner's requested entrapment instruction. The court reasoned that a defendant cannot simultaneously claim that he was not a member of the conspiracy and that he was entrapped into joining it. The court followed the prevailing rule that a defendant cannot deny involvement in a crime and at the same time present an entrapment defense (*id.* at 6-12).

3. Petitioner contends that this Court should review the decision below to resolve a conflict among the circuits regarding the availability of the entrapment defense when a defendant also denies involvement in the crime. It is not appropriate for this Court to address that conflict in this case, however, because petitioner would not have been entitled to an entrapment instruction under the law of *any* circuit. The evidence showed that petitioner joined the conspiracy before he was approached by anyone acting on behalf of the government, and the evidence also failed to show that petitioner was subjected to the kind of coercion or other pressure to commit a crime that is necessary to justify an entrapment instruction.

A defendant is entitled to an instruction on an affirmative defense only if the evidence meets minimum standards as to each element of the defense. *United States* v. *Bailey*, 444 U.S. 394, 415 (1980); *United States* v. *Stanley*, 765 F.2d 1224, 1234 (5th Cir. 1985). In order to warrant an entrapment instruction a defendant must establish, at a minimum that: (1) a government agent induced him to commit the crime, and (2) that he was not otherwise predisposed to commit the crime. *United States* v. *Busby*, 780 F.2d 804, 806 (9th Cir. 1986); *United States* v. *Woosley*, 761 F.2d 445, 448 (8th Cir. 1985).[1]

The evidence at trial established that petitioner was a member of the drug conspiracy well before Jones and Weeks began to cooperate with the government. Indeed, when petitioner visited them in jail, Jones and Weeks were still members of the conspiracy to arrange for future deliveries of cocaine. During these visits, petitioner discussed how the conspiracy would continue while Jones and Weeks were incarcerated and he provided false identification papers for Jones' potential replacement in the conspiracy. In short, petitioner was the intermediary between Warden and his suppliers, Weeks and Jones, before the government began investigating petitioner for his involvement in the conspiracy. Thus, the evidence was clear that if petitioner was involved in the conspiracy, his involvement predated the time the government obtained the cooperation of Jones and Weeks. For that reason, petitioner was not entitled to an entrapment instruction; he failed to show that his involvement in the conspiracy was the product of some action by the government.

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[1]The inducement must be caused by a government agent and not a private party. *United States* v. *Cruz*, 783 F.2d 1470, 1473 (9th Cir. 1986); *United States* v. *Perl*, 584 F.2d 1316, 1320-1322 (4th Cir. 1978), cert. denied, 439 U.S. 1130 (1979).

In addition, the evidence failed to present a jury question on the issue of inducement. To be entitled to an entrapment instruction, a defendant must show that he was in some way coerced, pressured, or persuaded to commit the offense; solicitation alone is not sufficient. See *United States* v. *Luce*, 726 F.2d 47, 49 (1st Cir. 1984); *United States* v. *Bagnell*, 679 F.2d 826, 835 (11th Cir. 1982), cert. denied, 460 U.S. 1047 (1983); *United States* v. *Hill*, 626 F.2d 1301, 1304 (5th Cir. 1980). The evidence in this case showed no more than mere solicitation on the part of Weeks and Jones. There was no evidence that they engaged in the kind of coercion or persuasion that is necessary to raise a jury question on the issue of entrapment.

Where, as here, the defendant has not met his initial evidentiary burden, he is not entitled to an instruction on entrapment. See, *e.g.*, *United States* v. *Sarmiento*, 786 F.2d 665 (5th Cir. 1986). Thus, regardless of whether a defendant can properly assert inconsistent defenses in an entrapment case, petitioner failed to make the kind of showing that was necessary to justify an entrapment charge. This Court recently denied certiorari in a case presenting a similar issue (*Mora* v. *United States*, cert. denied, No. 85-5437 (Jan. 21, 1986)), and there is no reason for a different result in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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